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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 510

W. T. GRANT COMPANY, a Corporation, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 215-219) has not yet been officially reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 22-58) are reported at 94 NLRB 1133.

JURISDICTION

The judgment of the court below was entered on November 10, 1952 (R. 224). The petition for a

writ of certiorari was filed on December 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*), appear in the Appendix, *infra,* pp. 10-11.

QUESTIONS PRESENTED

1. Whether an employer's refusal to bargain with a union, which represented a majority of his employees at the time he received the union's letter requesting bargaining and at the time he refused to bargain, is excusable because the union did not represent such majority at the time its bargaining request was mailed to the employer.

2. Whether substantial evidence supports the Board's finding, sustained by the court below, that petitioner's insistence upon a Board election as a prerequisite to recognition of the Union was not predicated upon a good faith doubt of the Union's majority status, but was motivated by a desire to gain time to undermine the Union and destroy its majority.

STATEMENT

Following the usual proceedings under Section 10 of the Act, the Board found, and the court below agreed, that petitioner violated Section 8 (a) (1) and (5) of the Act, (1) by refusing to recognize and bargain collectively with Retail Clerks Union,

Local 428, AFL (herein called the Union), (2) by unilaterally granting the employees benefits in the face of the Union's request to bargain, and (3) by interrogating its employees and by threatening to close the store rather than accede to a union shop. Petitioner challenges the decision below only insofar as it sustains the Board's finding of a refusal to recognize and bargain with the Union, in violation of Section 8 (a) (5).

A. *The facts as found by the Board*—On January 6, 1950, Francis J. Kihs, the manager of petitioner's store in San Jose, California (R. 37; 152), received in the mail the Union's request for a collective bargaining conference (R. 37; 70-71, 169-170). Kihs forwarded the Union's request to Eugene M. Foley, petitioner's attorney in New York, who arranged to meet with the Union (R. 71-72). The meeting was held on January 25 (R. 23, 37; 99-100, 112). At that time the Union held cards, signed between January 4 and January 6 by 20 of the 39 employees in the bargaining unit, designating the Union as the employees' bargaining representative (R. 23; 79-94, 96-99, 148-149).[1]

At the meeting, the Union proposed that petitioner check the authorization cards or employ "any other quick procedure" for ascertaining the Union's majority status, but Foley insisted upon a Board election before granting the Union's request for bargaining, and suggested that the Union

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[1] An additional employee had signed an authorization card (R. 95), but apparently left petitioner's employ before January 25.

file a representation petition with the Board (R. 23, 38; 100-102, 115-116, 186). Accordingly, the Union filed such a petition on January 31 (R. 38; 103, 121-127). Petitioner further insisted upon a formal hearing on the petition and refused the Union's request that it consent to an immediate election, notwithstanding the absence of any real issue other than the one to be determined by the election itself (R. 38-39; 69-70, 73-74, 76-78, 108, 117, 120, 121-127).[2]

Early in February, Manager Kihs, without consulting or notifying the Union, called a meeting of the employees in the store and announced that petitioner would grant certain merit wage increases to 23 of the employees and that 13 employees would have their work week changed from 6 days to 5 days, a change generally favored by the employees (R. 23-24, 39; 108-109, 137, 141-142, 143-144, 152-154, 156). These benefits became effective during the work week ending February 23 (R. 23-24, 39; 142, 143-144, 146, 152-154). Kihs had never before granted so many wage increases at one time; indeed he could not recall any prior occasion when such increases had been granted on a group basis (R. 39-40; 155-156). Nor did Kihs offer any explanation for his concurrent action in reducing the number of workdays of the 13 employees, although

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[2] The hearing was held on March 3, and on April 4, the Board issued its order directing the holding of an election (R. 39; 103-107, 121). The election was scheduled for May 3 (R. 39; 110). It was never held, however, because prior to the scheduled date the Union withdrew its petition and filed the unfair labor practice charge herein (R. 39; 108).

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he testified that one of the employees had requested such a change (R. 41; 156-157).

In March, Employee Putney, who was wearing a Union button while at work, was asked by Mrs. Kleidon, assistant manager of the store (R. 50; 143), whether she was the only girl in the store who belonged to the Union (R. 50; 144). Mrs. Putney thereupon removed the button (R. 50; 145). In April, Mrs. Kleidon asked Employee Nix why she still wore her Union button, and Miss Nix thereafter wore the button "on the underneath side" of her sweater (R. 50; 150-151). During the period from February through April, petitioner informed its employees that it intended to maintain an open-shop policy, and stated that "if we can't do business in San Jose on an open-shop basis, we just won't do business in San Jose" (R. 24-25, 42-44; 138-141, 145-146).

B. *The Board's conclusions and order*—Upon the above facts, the Board concluded that petitioner's interrogation of its employees concerning Union membership, its unilateral grant of benefits to its employees with the intent to discourage Union membership, and its threat to close its San Jose store rather than accede to a union shop, interfered with, restrained and coerced the employees in the exercise of their rights under Section 7 of the Act, thereby violating Section 8 (a) (1) (R. 23-24, 42, 46-49, 51).[3] The Board further concluded, in view of these unfair labor practices, that peti-

[3] These findings and conclusions are not challenged here (Pet. 4).

tioner's "insistence upon a Board election was not motivated by a good faith doubt concerning the Union's majority status, but rather by a desire to gain time to undermine the Union and destroy its majority," and that therefore petitioner's refusal to bargain with the Union since January 25, 1950, violated Section 8(a) (5) and (1) of the Act (R. 23-24, 52-53).[4]

Accordingly, the Board entered its customary order requiring petitioner to cease and desist from the unfair labor practices found, and directing petitioner to bargain with the Union upon request (R. 27-29, 32-33).

C. *Proceedings in the Court of Appeals*—The court below rejected as "specious" petitioner's contention that the Union's written request to bargain was rendered nugatory by the fact that the Union lacked a majority on the day the request was mailed (R. 216). It noted the complete absence of evidence to rebut the Board's finding that the Union's majority status, which was established on January 6, the day petitioner received the Union's request, continued through the work week ending January 25, when petitioner refused to bargain (*ibid.*). The court said: "Having in mind [petitioner's] activities following the meeting of January 25, we think the Board was not in error in finding that the insistence upon an election was not motivated by a good faith doubt of the union's

[4] The Board's additional conclusion that petitioner's unilateral grant of benefits constituted an independent violation of Section 8(a)(5) even without regard to petitioner's motive (R. 24, n. 4) is not contested here.

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majority, but by a purpose to gain time in which to undermine the union and vitiate its majority" (R. 217). Accordingly, the court granted enforcement of the Board's order in full (R. 220-224).

ARGUMENT

1. Petitioner's contention that its refusal to bargain with the Union was excusable because, on January 5—the day the Union's bargaining request was mailed—the Union had not been designated as their bargaining representative by a majority of the employees is, as the court below characterized it, "specious" (R. 216). Petitioner concedes, for the purpose of this question (Pet. 3-4), that the Union obtained a majority by January 6, when petitioner received the Union's bargaining request, and that the Union retained its majority through January 25, when petitioner refused to bargain. Moreover, the Board found, and the court below agreed, that petitioner at no time had a good faith doubt that the Union represented a majority of the employees. Thus whatever may have been the situation at the time the Union mailed its request to bargain, by the time the Company received it and thereafter acted upon it, the Union's majority had been established, and no more was required.

2. The facts set forth in the Statement (*supra,* pp. 3-5) amply support the Board's finding, sustained by the court below, that petitioner's insistance upon a Board election as a prerequisite to its recognition of the Union was not motivated by a good faith doubt of the Union's majority status, but rather by a desire to gain time to undermine

such status. While the Union had only a one-vote majority, that fact alone was not sufficient to establish that the Company had a genuine doubt as to the Union's majority, in view of the other circumstances indicating the Company's bad faith. The Board and the court below correctly concluded, therefore, that petitioner's refusal to recognize and bargain with the Union, since it was not motivated by a good faith doubt of majority, was in violation of Section 8 (a) (5) of the Act. *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Kobritz,* 193 F. 2d 8, 14 (C.A. 1). In any event, "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U.S. 175, 178.

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CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*) are as follows:

* * * * *

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

Sec. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United

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States * * * within any circuit or district, r
spectively, wherein the unfair labor practic
in question occurred or wherein such perso
resides or transacts business, for the enforc
ment of such order and for appropriate tem
porary relief or restraining order, and sha
certify and file in the court a transcript of th
entire record in the proceedings, including th
pleadings and testimony upon which suc
order was entered and the findings and orde
of the Board. Upon such filing, the court shal
cause notice thereof to be served upon suc
person, and thereupon shall have jurisdictio
of the proceeding and of the question deter
mined therein, and shall have power to gran
such temporary relief or restraining order a
it deems just and proper, and to make an
enter upon the pleadings, testimony, and pro
ceedings set forth in such transcript a decre
enforcing, modifying, and enforcing as s
modified, or setting aside in whole or in par
the order of the Board. * * * The jurisdic
tion of the court shall be exclusive and its judg
ment and decree shall be final, except that th
same shall be subject to review * * * by th
Supreme Court of the United States upon wri
of certiorari or certification as provided i
sections 239 and 240 of the Judicial Code, a
amended (U. S. C., title 28, secs. 346 and 347)

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